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No. 76-449

In the Supreme Court of the United States

OCTOBER TERM, 1976

CARMINE J. PERSICO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-2a) and the district court (Pet. App. 3a-6a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1976. A petition for rehearing was denied on July 23, 1976 (Pet. App. 7a). The petition for a writ of certiorari was filed on September 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the sentencing court may review parole release decisions under 28 U.S.C. 2255 and, if so, whether petitioner was arbitrarily denied release on parole.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to obstruct commerce and of obstruction of commerce by robbery from an interstate shipment, in violation of 18 U.S.C. 1951. He was sentenced to concurrent terms of 14 and nine years' imprisonment, with parole eligibility in the discretion of parole officials pursuant to 18 U.S.C. (1970 ed.) 4208(a)(2). He began serving his sentence on January 27, 1972, in Atlanta, Georgia; he was transferred two months later to the federal prison at Marion, Illinois.

Petitioner first applied for and was denied parole in June 1972.[1] He was considered a second time in April 1975, after which the Board of Parole concluded (Pet. App. 9a-10a):

> Your offense behavior has been rated as very high severity. You have a salient factor score of 5.[2]

[1]Prior to petitioner's parole consideration, his Bureau of Prisons case worker prepared a prison progress report, including a description of petitioner's institutional adjustment and an evaluation. The report recommended that an "en banc hearing" be conducted in petitioner's [c]ase "in view of the notoriety of this particular case" (Pet. 6). Petitioner filed suit in the United States District Court for the District of Columbia, seeking to enjoin the Board of Parole from referring petitioner's case for "en banc consideration" until all adverse material in his file had been disclosed and he had been afforded an opportunity to respond. Petitioner also sought disclosure of all material, including his presentence report, that would be before the Board. On April 2, 1975, the United States District Court for the District of Columbia transferred the matter to the Eastern District of Illinois, where petitioner is confined (Pet. 6-7).

[2]On review, the Board recognized that petitioner's salient factor score is 7, which indicates a range of 36 to 45 months to be served before release for cases with good institutional performance and adjustment. This computational error did not, however, affect the Board's decision (Pet. App. 4a).

> You have been in custody a total of 38 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 45-55 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant facts and information presented, it is found that a decision outside the guidelines at this consideration appears warranted. There is not a reasonable probability that you would live and remain at liberty without violating the law because of your long criminal history. Board policy limits a continuance to not more than 36 months without review. Your continuance has been limited by this policy. Your offense was part of a large scale or organized criminal conspiracy or an ongoing criminal enterprise. An unusually sophisticated or professional manner was evident in the planning or commission of the offense. It is believed that you are a poorer parole risk than indicated by the salient factor score.

On appeal, the full Board of Parole affirmed the decision (Pet. 8). Petitioner's case was set for another hearing in April 1978 (Pet. App. 9a).

In December 1975, petitioner filed in the United States District Court for the Eastern District of New York a motion for correction and reduction of sentence pursuant to 28 U.S.C. 2255. Arguing that the Board's decision not to grant him immediate parole was inconsistent with the intentions of the sentencing judge and the policies underlying Section 4208(a)(2), petitioner asked the sentencing judge to resentence him "to a length of incarceration as intended by the court when it first sentenced him and [*sic*] under 18 U.S.C. 4208(a)(2)" (A. 172-173).[3]

[3]"A." refers to the appendix in the court of appeals.

On February 20, 1976, the judge who originally sentenced petitioner held that the imposition of sentence under Section 4208(a)(2) did not give the sentencing court continuing jurisdiction to review actions of the Parole Board (Pet. App. 3a-6a). In denying petitioner's motion, the court also noted (Pet. App. 5a):

> The cases petitioner relies on are all cases in which correction of sentence was appropriate because their real effect was not evident at sentence time to court and counsel and the sentences produced an unanticipated protraction of incarceration. That is not this case.

The court of appeals affirmed, holding that the district court lacked jurisdiction (Pet. App. 2a).

While his motion under Section 2255 was pending in New York, petitioner filed a similar complaint, this time under 28 U.S.C. 2241, in the United States District Court for the Eastern District of Illinois, where he is confined. In that *habeas corpus* action petitioner has raised a number of challenges to his conviction and his treatment by the parole authorities, including all the claims presented here. The district court held a hearing on the petition June 21, 1976, and a supplemental hearing November 23, 1976.[4] On February 1, 1977, the court held that petitioner should have received a hearing before he was designated as a "special offender" by the Bureau of Prisons, and it ordered that he be given such a hearing. The court rejected petitioner's remaining attacks on his continued confinement.

ARGUMENT

1. Petitioner contends that the court of appeals' holding—that Section 2255 actions in the sentencing court may

[4]The supplemental hearing was ordered to consider the effect of *Holmes* v. *United States Board of Parole*, 541 F. 2d 1243 (C.A. 7).

not be used to challenge the decisions of the parole authorities—conflicts with *Kortness* v. *United States*, 514 F. 2d 167 (C.A. 8). We agree with petitioner that there is a conflict among the circuits on this question. Compare *Kortness* and *United States* v. *Salerno*, 538 F. 2d 1005 (C.A. 3), rehearing *en banc* denied, 542 F.2d 628 (Section 2255 is available to test parole decisions), with *United States* v. *DiRusso*, 535 F. 2d 673 (C.A. 1), *Billiteri* v. *United States Board of Parole*, 541 F. 2d 938 (C.A. 2), and *Coil* v. *United States*, C.A. 7, Misc. No. 76-8086, unpublished order filed September 17, 1976, certiorari denied, January 10, 1977 (No. 76-5742) (parole decisions must be tested in *habeas corpus*).[5] It may be that, in an appropriate case, the conflict among the circuits will require this Court's resolution. There is no need for consideration of it in the present case, however, because petitioner has not stated a claim cognizable under Section 2255 even in the Third and Eighth Circuits.

The Eighth Circuit recently has elaborated upon its holding in *Kortness*. *United States* v. *White*, 540 F. 2d 409 (C.A. 8), explained that *Kortness* allows sentencing courts to review their sentences in light of parole decisions under only two circumstances: where the parole authorities have denied a prisoner "meaningful consideration" for parole, in violation of the principles announced in *Garafola* v. *Benson*, 505 F. 2d 1212 (C.A. 7),[6] and where, after

[5]See also *United States* v. *Huss*, 520 F. 2d 598, 603 (C.A. 2); *Freeman* v. *United States*, 254 F. 2d 352, 353-354 (C.A. D.C.).

[6]*Garafola* held that the parole authorities must give persons sentenced under 18 U.S.C. (1970 ed.) 4208(a)(2) a hearing at or close to the completion of one-third of their sentence; the court concluded in *Garafola* that the Board of Parole's practice—which is no longer followed—of giving a person sentenced under Section 4208(a)(2) a hearing promptly after the beginning of the sentence, and on occasion deferring further consideration until well after the one-

sentencing, the parole authorities have changed their paroling procedures in a way that alters "the import of the judge's sentence" (540 F. 2d at 411). See also *Ryan* v. *United States*, C.A. 8, No. 76-1779, decided January 7, 1977; *Fields* v. *United States*, 542 F. 2d 472 (C.A. 8); *Pope* v. *Sigler*, 542 F. 2d 460 (C.A. 8); *United States* v. *Clinkenbeard*, 542 F. 2d 59 (C.A. 8); *Jacobson* v. *United States*, 542 F. 2d 725 (C.A. 8). The Third Circuit, in an opinion denying the petition for rehearing *en banc* in *Salerno*, has interpreted its decision as adhering to the principles established in *White*.

We believe that *Kortness* and *Salerno* were wrongly decided. Section 2255 provides for relief only when the sentence, or the proceedings leading to it, were defective, and the sentence is therefore infirm. *Davis* v. *United States*, 417 U.S. 333; *Affronti* v. *United States*, 350 U.S. 79, 83. The district court's power over the length of sentence expires 120 days after the sentence has been imposed or the judgment has been upheld on appeal.[7] Fed. R. Crim. P. 35. This time limit is jurisdictional and may not be extended. Fed. R.

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third point, prevented the Board from giving adequate attention to the prisoner's institutional record. Petitioner has not contended that he did not receive a hearing at or near the one-third point of his sentence.

[7]See *United States* v. *DiRusso*, C.A. 1, No. 76-1291, decided December 27, 1976, slip op. 5, 6 ("the division of responsibility between the sentencing court and the Parole Commission would be skewed if a sentence could be vacated whenever the Parole Commission exercised its discretion so that a particular prisoner was to be confined for a substantially longer period than the sentencing judge had contemplated. * * * To permit the district court to revise a sentence whenever the Parole Commission's decision was inconsistent with his intent would divest the Commission of its discretionary power under the law, and defeat the objectives of placing the parole decision in a separate body").

Crim. P. 45(b).[8] Persons desiring to attack the execution of their sentences are entitled to relief only in the district in which they are confined, as 28 U.S.C. 2241 provides.

In any event, *Kortness* and *Salerno*, as interpreted in *White*, offer no help to petitioner. Petitioner has received the hearing required by *Garafola*, and no changes in parole procedures after the date of petitioner's sentence have altered its "import." He has simply been denied parole because, in the view of the Parole Commission, he does not deserve to be released so early in his sentence. The district court was therefore without jurisdiction of this case, even under the authorities most favorable to petitioner.

2. Even if the district court had jurisdiction in this case, however, it did not err in rejecting petitioner's demand to be released. Parole decisions are entrusted to the discretion of the Parole Commission. The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219, 231, provides that the Commission is not an "agency" for purposes of Sections 554, 555, 556 and 557 of the Administrative Procedure Act, and that the actions of the Commission in releasing or declining to release prisoners "shall be considered actions committed to agency discretion for purposes of section 701(a)(2)" of the Administrative Procedure Act. This means, as the Conference Committee explained (S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 36 (1976)), that only the Commission's rulemaking processes, and not its parole decisions in individual cases, are open to judicial review. The type of review that petitioner seeks to obtain therefore is not available.

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[8]See *United States* v. *Norton*, 539 F. 2d 1082 (C.A. 5), petition for a writ of certiorari pending (No. 76-5675); *United States* v. *Becker*, 536 F. 2d 471 (C.A. 1); *Thompson* v. *United States*, 536 F. 2d 459 (C.A. 1).

Nothing in the former Section 4208(a)(2)[9] calls for a different result. Section 4208(a)(2) was designed to allow district courts to give indeterminate sentences. *Grasso* v. *Norton*, 520 F. 2d 27, 32 (C.A. 2). It allowed district courts to eliminate the statutory minimum amount of time a prisoner normally would be required to serve before becoming eligible for parole. But it was not intended to compel the parole authorities to grant early parole; to the contrary, it was designed to increase, rather than reduce, the flexibility of the parole authorities. See H. R. Rep. No. 1946, 85th Cong., 2d Sess. 3 (1958). Neither the statute nor anything in its legislative history indicates that district courts were to be given the power to second-guess parole decisions whenever the parole authorities did not release the prisoner after one-third of the sentence had been served.[10]

[9]A similar provision in the Parole Commission and Reorganization Act, 90 Stat. 222, will be codified at 18 U.S.C. (1976 ed.) 4205 (b)(2).

[10]Moreover, to the extent petitioner here complains about constitutional or statutory improprieties in the actions of the parole authorities, the case recently decided by the Eastern District of Illinois is the proper vehicle for the resolution of these claims. Petitioner's action in the Eastern District of New York asks the sentencing court to resentence him, and the sentencing judge already has indicated (Pet. App. 5a) that petitioner's continued imprisonment is not inconsistent with the intention at the time of sentencing. The proceeding in Illinois resolved petitioner's due process and statutory claims, and petitioner would not be entitled to relitigate these claims in New York. *Sanders* v. *United States*, 373 U.S. 1, 15-18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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